STATE OF MICHIGAN

COURT OF APPEALS

CITY OF MARSHALL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, and CONSUMERS POWER COMPANY,

Defendants-Appellees,

and

MICHIGAN MUNICIPAL ELECTRIC ASSOCIATION, and MICHIGAN SOUTH CENTRAL POWER AGENCY,

Amicus Curiae.

UNPUBLISHED
September 9, 1997

No. 187644
Public Service Commission
LC No. U-10676

Before: Wahls, P.J., and Young and J. Fisher*, JJ.

PER CURIAM.

Appellant City of Marshall claims an appeal from an order of the Michigan Public Service Commission (PSC) granting the application filed by appellee Consumers Power Company (CPC) for a certificate of public convenience and necessity (CPCN) pursuant to 1929 PA 69 (Act 69), MCL 460.501 *et seq*.; MSA 22.141 *et seq*. We affirm.

I

The City of Marshall owns and operates a municipal electric utility. The utility has approximately 4,325 customers in the city and surrounding townships. In addition, CPC, a public utility, provides electric service to and conducts an electricity business in Marshall. Beginning in the mid-1970's, Marshall provided 120/208 volt electric service to a building located at 18751 East Michigan

* Circuit judge, sitting on the Court of Appeals by assignment.

Avenue in Marengo Township. That township is contiguous with Marshall. In the spring of 1992, V.L. Industries (VLI) leased the building with the intention of moving various equipment to the building and conducting assembly work there. In late 1992 VLI obtained price quotes from both Marshall and CPC for the provision of 480 volt service. Because Marshall's rates were slightly higher than those charged by CPC, VLI requested that Marshall's service be disconnected and that CPC install and supply 480 volt service. Marshall did not consent to the switch; nevertheless, CPC installed the necessary equipment, and, in December 1992, VLI and CPC disconnected Marshall's service. Simultaneously, CPC connected its own 480 volt service. To supply the service, CPC constructed 1,680 feet of new overhead three-phase service, a three-phase power bank, and two hundred feet of 480 volt, three-phase service. The cost of the new facilities was approximately $11,808. Marshall continued to supply service for a portable office trailer and security lights on the entire property, and to a VLI building inside the city limits.

Because CPC did not apply for a CPCN prior to initiating service to VLI, Marshall filed a complaint with the PSC to address the issue whether CPC was required to do so. In an order entered on August 25, 1994, the PSC found that CPC was required to obtain a CPCN before it could lawfully provide service to VLI. On September 14, 1994, CPC filed an application with the PSC for a CPCN. Marshall intervened to oppose the application.

A

In a proposal for decision (PFD) issued on March 24, 1995, the administrative law judge (ALJ) examined each factor in § 5 of Act 69, MCL 460.505; MSA 22.145. Section 5 provides in part:

> In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory.

The ALJ found that the evidence showed that Marshall supplied adequate service to VLI, and that Marshall could have supplied the 480 volt service requested by VLI. Although Marshall and CPC were of different sizes, Marshall's loss of one customer and CPC's gain of one customer would not significantly impact the rates or quality of service of either utility. Because the evidence showed that the facilities built by CPC to serve VLI would have been built at any rate, duplication of facilities would be minimal. Transfer of the customer would not result in wasteful duplication of facilities or needless multiplication of utilities in the area. VLI had expressed a preference for CPC's service due to the lower rates; therefore, the public would benefit by having a lower rate charged to an industrial customer that participated in the local economy. While Marshall had declined to voluntarily comply with the requirements of 1979 AC R 460.3411 (Rule 411), permitting a regulated utility to take a customer from another regulated utility only with the consent of the losing utility, it had not otherwise engaged in aggressive or questionable behavior that would weigh against it in determining whether the application should be granted. On the other hand, CPC began serving VLI before it sought a CPCN, in violation of § 2 of Act 69, MCL 460.502; MSA 22.142, which requires that a public utility obtain a CPCN

before initiating service under circumstances such as those present in this case. Because the criteria in § 5 did not point in a definite direction, the ALJ concluded that to grant CPC's application would reward it for illegal activities. The ALJ recommended that, based on equitable factors, the application be denied.

B

In a decision issued on June 30, 1995, the PSC rejected the ALJ's recommendation and granted CPC's application. The PSC noted that Act 69 applications should be evaluated in light of the goals of preventing needless multiplication of facilities serving the same area, avoiding wasteful duplication of facilities, keeping necessary investment at the lowest level consistent with providing satisfactory service, and excluding competition where the general public convenience and necessity so required. This case did not present a significant risk of unnecessary investment in facilities or duplication. The record supported the ALJ's finding that CPC would have built the facilities in any event, because they were designed to link a portion of CPC's system to a new substation. While the switch would divert revenues from Marshall to CPC, neither utility would suffer an adverse financial impact. Marshall was still providing service to a portion of VLI's new location within the municipal boundaries. The PSC rejected Marshall's contention that a price advantage for a particular customer was not a sufficient reason to warrant the granting of a CPCN, and reasoned that a rate advantage achieved by an industrial customer participating in the local economy would benefit the public at large. The evidence showed that VLI would realize an annual savings of approximately $1,300. The PSC concluded that, on balance, the record supported the granting of CPC's application. The PSC found that when combined with the statutory criteria, the fact that VLI expressed a strong preference for CPC's service was entitled to considerable weight. While acknowledging that CPC did not seek a CPCN prior to providing service to VLI, the PSC found that VLI should not be penalized for this act by having its service disrupted and by being forced to pay higher rates. The PSC concluded that, under all the circumstances, the public convenience would be better served by granting the application.

II

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). Moreover, Const 1963, art 6, § 28 applies, and provides that a final agency order must be authorized by law and supported by competent, material, and substantial evidence on the whole record. *Attorney General v Public Service Comm*, 165 Mich App 230; 418 NW2d 660 (1987). A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Yankoviak v Public Service Comm*, 349 Mich 641, 648; 85 NW2d 75 (1957).

On appeal, Marshall argues that the PSC's decision is unlawful and unreasonable, and is not supported by the record. The policy behind Act 69 is to restrict price-based competition so as to avoid unnecessary duplication of facilities. *Huron Portland Cement Co v Public Service Comm*, 351 Mich 255, 267-268; 88 NW2d 492 (1958); *Panhandle Eastern Pipe Line Co v Public Service Comm*, 328 Mich 650, 664; 44 NW2d 324 (1950). Marshall claims that the PSC's decision in this case represents a fundamental departure from this policy in that the PSC gave undue weight to the wishes of the customer, and failed to properly consider the criteria in § 5. Marshall argues that CPC was obligated to construct facilities in order to provide VLI with 480 volt service, and that these facilities duplicated the extant facilities owned by Marshall. According to Marshall, by using the facilities it had in place and simply changing a transformer, it could have provided VLI with 480 volt service. Marshall also complains that the PSC improperly focused on the rate advantage that VLI would obtain by switching to CPC service, whereas § 5 requires that the PSC consider the benefit to the general public, *Panhandle*, *supra*, 328 Mich at 664, and that even if Marshall could offer service at a lower rate, VLI could not switch back and receive that service at the Michigan Avenue site absent permission from CPC.

We are not persuaded by Marshall's arguments, and instead conclude that the PSC's interpretation and application of Act 69, and in particular § 5, in this case represents an appropriate exercise of its authority, judgment, and discretion. Act 69 does not bar all duplication; rather, it provides a procedure by which the PSC can monitor utilities and prevent unnecessary duplication from occurring. The requirement that a public utility seek and obtain a CPCN is designed to allow the PSC to monitor switching activity and to prevent unnecessary duplication and waste. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 678; 523 NW2d 483 (1994). The PSC has not ignored its legislative mandate and developed its own public policy. The PSC considered the relevant factors and determined, based on the evidence in this case, that CPC's application for a CPCN should be granted. We give great deference to the interpretation of a statute by the agency charged with the duty of enforcing that statute. *Telephone Ass'n of Michigan v Public Service Comm*, 210 Mich App 662, 670; 534 NW2d 223 (1995).

By requiring consideration of a number of specific factors, § 5 indicates that each application for a CPCN is to be considered on its own facts. The weight to be assigned to each factor is within the discretion of the PSC. *Telephone Ass'n*, *supra*. The PSC's application of § 5 in this case is supported by the evidence. The evidence showed that the duplication of facilities was *de minimus*. CPC's witness gave unrebutted testimony that the facilities built to serve VLI would have been built in any event as part of a project to upgrade service and connect to a substation. Marshall did not challenge the propriety of CPC's building of facilities to connect to a substation, and its argument regarding the adverse effect of aggregate duplication of facilities is speculative. Moreover, the PSC did not improperly focus on the benefit of lower rates to VLI rather than on the benefit to the public at large. While no concrete showing was made that the general public would benefit from the lower rate obtained by VLI, the fact that VLI, a local business with economic ties to the community, would receive lower rates could not be discounted. Further, although the evidence showed that Marshall's remaining customers would pay a slightly higher rate due to the loss of VLI from Marshall's rate base, that fact, when weighed against VLI's savings, did not justify denying CPC's application.

We also agree with the PSC's finding that the fact that customers located outside Marshall's municipal boundaries that switched to CPC's service could not switch back to Marshall's service without CPC's consent should not weigh heavily against the granting of the application. Pursuant to *Marshall*, *supra*, CPC could not seek to serve a customer currently served by Marshall without first applying for and obtaining a CPCN. Granting the application gives neither Marshall nor CPC unfettered access to the other's customers. Finally, the PSC's determination that VLI should not be penalized for CPC's violation of § 2 of Act 69, MCL 460.502; MSA 22.142, is supported by the evidence. VLI approached CPC and inquired about switching service. CPC did not take the offensive in seeking VLI as a customer. CPC applied for a CPCN after the PSC held that it was required to do so.

Section 5 of Act 69, MCL 460.505; MSA 22.145, grants the PSC the authority to weigh the enumerated factors and determine whether, on the evidence before it, an application for a CPCN should be granted. Because the enumerated factors, when evaluated, did not clearly favor one party over the other, the PSC properly weighed equitable factors, including VLI's desire to switch to CPC, and granted the application. We conclude that the order was supported by the requisite evidence, and was not unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8).

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher